

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Charleston, West Virginia

No. 33502

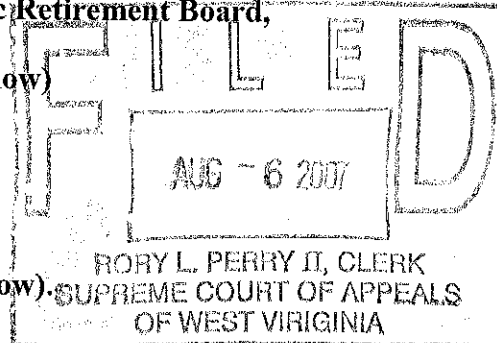
State of West Virginia Consolidated Public Retirement Board,

Petitioner (Respondent below)

v.

William R. Smith,

Respondent (Petitioner below)



**APPEAL FROM ORDER OF CIRCUIT COURT OF BERKELEY COUNTY,
CERTIFYING QUESTION TO THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**Civil Action No. 06-C-156
Christopher C. Wilkes, Judge**

**BRIEF ON BEHALF OF APPELLANT,
WEST VIRGINIA CONSOLIDATED PUBLIC RETIREMENT BOARD**

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TABLE OF CONTENTS

I. NATURE OF PROCEEDING AND RULING OF COURT BELOW.....	1
II. STATEMENT OF FACTS AND PROCEDURAL HISTORY	1
III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE COURT BELOW	5
IV. DISCUSSION OF LAW.....	6
A. The Circuit Court Erred By Failing To Afford Appropriate Deference To The Board's Reasonable And Permissible Construction Of Applicable Statutes And Rules As The Administrative Body Charged With Enforcing Such Statutes And Rules.....	6
B. The Circuit Court Erred By Failing To Apply The Laws That Clearly Provide That The Reelection Of A Public Official To A Consecutive Term Of Office Does Not Constitute Reemployment Under W. Va. Code § 5-10-18(a) Such That The Incumbent Is Eligible To Reinstate Forfeited PERS Service Credit.....	8
V. CONCLUSION.....	11
VI. RELIEF PRAYED FOR	12

TABLE OF AUTHORITIES

Cases

<u>Dillon v. Bd. of Educ.</u> , 171 W. Va. 631, 301 S.E.2d 588 (1983).....	7
<u>Healy v. W. Va. Bd. of Medicine</u> , 506 S.E.2d 89, 92 (W. Va. 1998).....	7
<u>Smith v. State Workmen's Comp. Comm'r</u> , 159 W. Va. 108, 219 S.E.2d 361 (1975).....	7
<u>Sniffen v. Cline</u> , 193 W. Va. 370, 456 S.E.2d 451 (1995)	7
<u>State ex rel. Dadisman v. Moore</u> , 181 W. Va. 779, 384 S.E.2d 816 (1988).....	1
<u>State ex rel. W. Va. Deputy Sheriffs' Ass'n, Inc. v. Sims</u> , 204 W. Va. 442, 513 S.E.2d 669 (1998).....	1
<u>W. Va. Dept. of Health v. Blankenship</u> , 189 W. Va. 342, 431 S.E.2d 681 (1993).....	7
<u>W. Va. Non-Intoxicating Beer Comm'r v. A & H Tavern</u> , 181 W. Va. 364, 382 S.E.2d 558 (1989).....	7
<u>Zapata Haynie Corp. v. Barnard</u> , 933 F.2d 256, 258 (4th Cir. 1991)	7

Statutes

I.R.C. § 401(a)	2
W. Va. Code § 29A-5-4	5, 7
W. Va. Code § 29A-5-4(g)	7
W. Va. Code § 5-10-18(a).....	1, 4, 5, 9, 10, 11, 12
W. Va. Code § 5-10-18(d)	5
W. Va. Code § 5-10-19(d)	4
W. Va. Code § 5-10-3a	2
W. Va. Code § 5-10D-1	1
W. Va. Code § 6-5-2.....	5, 10

Other Authorities

W. Va. Code R. § 162-2-1	3
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I. NATURE OF PROCEEDING AND RULING OF COURT BELOW

The State of West Virginia Consolidated Public Retirement Board (hereinafter "Board") respectfully appeals the Circuit Court of Berkeley County's Certified Question, entered December 22, 2006, requesting an answer to the following question: "Does the reelection of an incumbent, to a consecutive term of office, constitute reemployment under W. Va. Code § 5-10-18(a), thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest?" The Circuit Court answers this question in the affirmative. The Board appeals the Circuit Court's decision and seeks an opposite ruling regarding the certified question for the reasons stated herein below.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

The West Virginia Consolidated Public Retirement Board is a public body established pursuant to W. Va. Code § 5-10D-1 to serve as the statutory administrator and fiduciary for the State's several pension plans, including the largest of those plans, the West Virginia Public Employees Retirement System ("PERS"). State ex rel. W. Va. Deputy Sheriffs' Ass'n, Inc. v. Sims, 204 W. Va. 442, 513 S.E.2d 669 (1998). The members of the Board include the highest officials of the executive and legislative branches of our State's government, and the Board and its members have the "highest fiduciary duty to maintain the terms of the PERS trust, as spelled out in the statute." State ex rel. Dadisman v. Moore, 181 W. Va. 779, 384 S.E.2d 816 (1988). As a federally qualified pension plan, it is incumbent upon the Board, as part of its fiduciary duty, to ensure that the PERS plan is administered according to its terms, for the exclusive benefit of all plan participants and beneficiaries, in order to protect and preserve the

plan's qualified tax status. See I.R.C. § 401(a); see also W. Va. Code § 5-10-3a. For these reasons, *inter alia*, the Board brings this appeal before the Court.

William R. Smith ("Smith"), a member of the Public Employees Retirement System, was born on June 11, 1947. See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 5, at p. 2. He commenced participation in the PERS plan through his employment as a deputy sheriff in Berkeley County in 1977 and remained an active PERS participant until 1989, compiling twelve (12) years and five (5) months of credited service. Id.; see also Adm. Rec. Exh. 8. In 1989, upon terminating his employment, Smith withdrew his PERS contributions, which amounted to Eleven Thousand Seventy-Five Dollars and Seventy-Seven Cents (\$11,075.77). See Adm. Rec. Exh. 8. In November 2000, Smith was elected Sheriff of Berkeley County, beginning service in that position on January 1, 2001. See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 5, at pp. 2-3. Since January 1, 2001, Smith has accumulated more than six (6) years of credited service in PERS. Id.

On May 21, 2003, Board staff sent Smith a letter advising him of his right to reinstate his previously withdrawn service credit by repaying the withdrawn amount plus interest, which totaled Twenty-One Thousand Eight Hundred Sixty-Eight Dollars and Seventy-Eight Cents (\$21,868.78). See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 5, at p. 3; see also Exh. 8. The May 21, 2003 letter described three options for installment payments, followed by a statement that: "[i]nitial payment must be received no later than 12-31-2004 and reinstatement must be paid in full within 60 months of first payment." See Adm. Rec. Exh. 8. On June 29, 2004, the Board's staff sent a second letter to Smith offering the same installment-pay options and containing identical language requiring an initial payment by December 31, 2004. Id. Smith testified during the administrative hearing held in this matter that he simply did

not pay attention to the details of those letters. See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 5, at p. 3.

On January 1, 2005, Smith commenced his second consecutive term as Sheriff of Berkeley County. See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 5, at p. 3. On June 20, 2005, Smith attempted to make a partial payment of Five Thousand Dollars (\$5,000.00) to the Board to reinstate his previously withdrawn service credit, but the Board returned this payment to Smith as untimely received because an initial payment had not been made by December 31, 2004. Id.; see also Adm. Rec. Exh. 8. On July 12, 2005, Board staff denied Smith's request to reinstate the withdrawn service credit. See Adm. Rec. Exh. 8. Smith requested an administrative appeal hearing pursuant to the Board's Benefit Determination and Appeal Rules, W. Va. Code R. § 162-2-1, *et seq.*, which was held on November 4, 2005. See Adm. Rec. Exh. 8.

During the administrative hearing, Smith testified that upon being elected to his first term as Sheriff, he was told by county employees only that he had five years within which to repay his withdrawn contributions. See Tr. at p. 5. Smith testified that he did not ask the Board staff any questions regarding reinstatement windows, and that his only inquiries to the Board regarding reinstatement were to confirm the amount he was required to repay. Id. at pp. 5-6. During the hearing, Smith stated that he believed a new opportunity to reinstate previously withdrawn service credit opened upon his re-election to a second term of office as Sheriff; however, he never asked the Board staff if this was the case. Id. at 14. Smith agreed that during the period between which he was re-elected (November 2004) and sworn in to a second term (spring 2005), he acted as Sheriff, received a paycheck, and made contributions to PERS as he had since January 2001. Id. at p. 13. J. Michael Adkins, then-Acting Executive Director of the

Board, also testified that Smith's membership in PERS and employment were not terminated as a consequence of one term of office ending and another beginning consecutively. Id. at pp. 16-17. Following the hearing, Smith submitted a Board brochure in support of his request. See Recommended Decision of Hearing Examiner, Adm. Rec. at Exh. 5, at p. 1.

On November 16, 2005, the hearing examiner issued a recommended decision to deny Smith's request. See Recommended Decision of Hearing Officer, Adm. Rec. Exh. 5, at p. 7. The hearing examiner concluded that Smith had two windows of opportunity within which to reinstate his previously forfeited service credit. Id. Under W. Va. Code § 5-10-18(a), the general reinstatement provision, Smith had two years from January 1, 2001, the date of his reemployment by a participating employer. Id. Under the special provision of W. Va. Code § 5-10-18(d), which reopened the reinstatement window for any member, Smith had until December 31, 2004, the date on which the special provision ended. Id. The hearing examiner concluded that the Board letters accurately informed Smith about those windows, and that because Smith did not act within either window, he could not now reinstate the previously forfeited credit. Id. at pp. 5-6.

The hearing examiner also concluded that Smith was not eligible for a new opportunity to reinstate his credit merely because he was elected to a second term as Sheriff. Id. at p. 6. The hearing examiner found that there was no break in service that would initiate a new opportunity. Id. This finding was based in part on W. Va. Code § 6-5-2, which provides that the term of every officer (including that of Sheriff) continues until a successor is elected or appointed. Id. By Final Administrative Order dated February 1, 2006, the Board adopted the Recommended Decision and denied Smith's request to reinstate previously withdrawn service credit. See Adm. Rec. Exh. 2.

Pursuant to the judicial review provisions of the West Virginia Administrative Procedures Act, W. Va. Code § 29A-5-4, Smith filed a Petition for Appeal in the Circuit Court of Berkeley County, West Virginia on March 3, 2006. Smith argued that the hearing examiner's conclusion that repayment had to begin by December 31, 2004 under W. Va. Code § 5-10-18(d) was in error, and that Smith, in fact, had five years from January 1, 2001 within which to pay for and reinstate his forfeited service credit. Smith also argued that his election to a second term of office started a new two-year window of opportunity for reinstatement of the forfeited credit under W. Va. Code § 5-10-18(a). The case was assigned to Judge David H. Sanders. The Circuit Court entered a Scheduling Order and briefs were filed by both parties. On June 23, 2006, Judge Sanders recused himself, and the case was later assigned to Judge Christopher C. Wilkes.

On December 22, 2006, Judge Wilkes certified the question presented in this appeal: Does the reelection of an incumbent, to a consecutive term of office, constitute reemployment under W. Va. Code § 5-10-18(a) thereby making the incumbent eligible to reinstate forfeited PERS credit upon repayment of the amount withdrawn plus interest? The Circuit Court answered this question in the affirmative. The Board filed a Petition for Appeal on February 20, 2007, which was granted by this Honorable Court on June 27, 2007. The Board received notice of this Court's decision to grant the Petition on July 5, 2007.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE COURT BELOW

A. The Circuit Court Erred By Failing To Afford Appropriate Deference To The Board's Reasonable And Permissible Construction Of Applicable Statutes And Rules As The Administrative Body Charged With Enforcing Such Statutes And Rules.

B. *The Circuit Court Erred By Failing To Apply The Laws That Clearly Provide That The Reelection Of A Public Official To A Consecutive Term Of Office Does Not Constitute Reemployment Under W. Va. Code § 5-10-18(a) Such That The Incumbent Is Eligible To Reinstate Forfeited PERS Service Credit.*

IV. DISCUSSION OF LAW

A. The Circuit Court Erred By Failing To Afford Appropriate Deference To The Board's Reasonable And Permissible Construction Of Applicable Statutes And Rules As The Administrative Body Charged With Enforcing Such Statutes And Rules.

This matter came before the Circuit Court below pursuant to W. Va. Code § 29A-5-4 of the West Virginia Administrative Procedures Act ("Act"). Section 29A-5-4(g) of the Act governs the review of contested administrative decisions and issues by a circuit court, and specifically provides that:

(g) The Court may affirm the ... decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the ... decision of the agency if the substantial rights of the petitioner ... have been prejudiced because the administrative ... decisions are:

In violation of constitutional or statutory provisions; or

In excess of statutory authority or jurisdiction of the agency; or

Made upon unlawful procedure; or

Affected by other error of law; or

Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or

Arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

This Court has consistently held that factual findings by an administrative agency should be given great deference, and should not be disturbed on appeal unless clearly wrong or arbitrary and capricious. See e.g. Healy v. W. Va. Bd. of Medicine, 506 S.E.2d 89, 92 (W. Va. 1998).

Statutory interpretive issues, on the other hand, constitute questions of law which are generally subject to *de novo* review. However, with respect to judicial review of an administrative agency's interpretations of the statutes which it administers, and notwithstanding the general rule of *de novo* review of issues of law, this Court has held that "absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of [a] statute by [an administrative agency]" having policy-making authority relating to the statute. See e.g. Sniffen v. Cline, 193 W. Va. 370, 456 S.E.2d 451 (1995). In Sniffen, this Court explained:

The circuit court's adjudicatory interpretation of the [controlling statute] is entitled to no special deference and is subject to our independent review. However, absent clear legislative intent to the contrary, we afford deference to a reasonable and permissible construction of the statute by [the administrative agency] because it has policymaking authority with regard to the statute. Consistently, this Court has held that interpretations of statutes by administrative bodies charged with enforcing such statutes are to be afforded great weight. [An agency's] construction of these statutes must be given substantial deference.

465 S.E.2d at 455 (citing Zapata Haynie Corp. v. Barnard, 933 F.2d 256, 258 (4th Cir. 1991); W. Va. Dept. of Health v. Blankenship, 189 W. Va. 342, 431 S.E.2d 681 (1993); W. Va. Non-Intoxicating Beer Comm'r v. A & H Tavern, 181 W. Va. 364, 382 S.E.2d 558 (1989); Dillon v. Bd. of Educ., 171 W. Va. 631, 301 S.E.2d 588 (1983); Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975)).

In answering the certified question in the affirmative, the Circuit Court failed to afford "great weight" to the Board's reasonable and permissible interpretation of W. Va. Code § 5-10-18(a). The Board staff, hearing examiner and the Board itself all concluded that the reelection of an incumbent to a second, consecutive term of office did not constitute reemployment so as to provide the incumbent an additional opportunity to reinstate previously withdrawn service credit pursuant to § 5-10-18(a). The Board's then-Acting Executive Director, J. Michael Adkins, testified at the administrative hearing that the Board would consider these circumstances as a "single hiring," "since there was continuous employment without break in PERS and employment service." The hearing examiner concluded that "[t]he applicant's contention that a new opportunity to reinstate under subsection (a) of § 5-10-18 arose upon commencement of his second term as Sheriff is, regrettably, without merit ... it must be concluded that his employment has been continuous and no new opportunity to reinstate under such subsection (a) has arisen." *Id.* at pp. 6-7. The hearing examiner's recommended decision was duly adopted by the Board. See Adm. Rec. Exh. 2.

As more fully discussed below, this decision was both reasonable and consistent with clearly expressed legislative intent. Accordingly, the Circuit Court erred in failing to afford great weight and substantial deference to this interpretation.

B. The Circuit Court Erred By Failing To Apply The Laws That Clearly Provide That The Reelection Of A Public Official To A Consecutive Term Of Office Does Not Constitute Reemployment Under W. Va. Code § 5-10-18(a) Such That The Incumbent Is Eligible To Reinstate Forfeited PERS Service Credit.

The language of W. Va. Code § 5-10-18(a) clearly contemplates one opportunity for a previous member to reinstate withdrawn service credit. W. Va. Code § 5-18-18(a) provides, in relevant part, as follows:

When a member of the Retirement System retires or dies, he or she ceases to be a member. When a member leaves the employ of a participating public employer for any other reason, he or she ceases to be a member and forfeits service credited to him or her at that time. If he or she becomes reemployed by a participating public employer he or she shall be reinstated as a member of the Retirement System and his or her credited service last forfeited by him or her shall be restored to his or her credit ... Provided, however, That he or she returns to the members' deposit fund the amount, if any, he or she withdrew from the fund, together with regular interest on the withdrawn amount from the date of withdrawal to the date of repayment, and that the repayment begins *within two years of the return to employment* and that the full amount is repaid within five years of the return to employment.

(emphasis added). In answering the certified question in the affirmative, the Circuit Court essentially equated an incumbent's reelection to a consecutive term of office with an incumbent's reemployment; however, the statute unambiguously ties the opportunity for reinstatement of forfeited service credit to a member's initial "return to employment."

Like Smith, an incumbent who is reelected to a second, consecutive term continues in the employment without any break in service. In practice, this is evident because a reelected incumbent remains employed and continues to receive pay and other benefits in accordance with that employment. Moreover, W. Va. Code § 6-5-2 provides that an official's term continues until a "successor" is elected and qualified.¹ A "successor" is defined as: "one who takes the place that *another* has left," Black's Law Dictionary 998 (abr. 6th ed. 1991) (emphasis added), or "one that succeeds *another*," The American Heritage Dictionary of the English Language, 4th Ed. Houghton Mifflin Company, 2004 (emphasis added). A public

¹ W. Va. Code § 6-5-2 provides as follows:

The term of every office shall continue (unless the office be vacated by death, resignation, removal from office, or otherwise) until his successor is elected or appointed, and shall have qualified.

official who is reelected to the same office is not a "successor" to himself. Thus, a reelected public official continues, by statute, to be *employed* in that position until another individual is elected. The Circuit Court's ruling assumes that in, the same instant, an official loses his position and then regains it, when in actuality and according to the relevant statute, no break in employment ever occurs.

The Circuit Court's interpretation also ignores the implication of the language found in W. Va. Code § 5-10-18(a) which states that a reemployed member "shall be reinstated as a member of the retirement system." This language clearly contemplates that the window for reinstatement of previously forfeited service credit occur within two years of the reemployment that triggers a reinstatement in PERS. An official who is reelected to a second and consecutive term of office is reinstated in PERS only once: upon the commencement of his first term of office. As both Smith and J. Michael Adkins, former Acting Executive Director of the Board, testified in Smith's administrative hearing, the fact that Smith's first term of office ended and his second term of office began did not cause any break in PERS membership. See Tr. at pp. 13, 16-17. The statute additionally specifies that it creates an opportunity to reinstate "service last forfeited," indicating that a member may only reinstate service credit forfeited from the directly preceding term. The implication from these provisions is that the opportunity for reinstatement begins to run upon the initial return to employment.

Finally, the Circuit Court's interpretation violates the intent of the Legislature, as expressed by the statute, by providing certain elected public officials multiple opportunities for reinstatement, while denying the same opportunity to other members of PERS. In the case of officials with two-term limits, such as Sheriffs, one additional opportunity may seem insignificant; however, officials with no term limits would be afforded essentially unlimited

opportunities to reinstate forfeited service credit provided they were reelected. The statute clearly states that there is but one window for reinstatement: within two years of reemployment. It is doubtful that the Legislature intended that the two-year time limit on reinstatement apply only to those PERS members who do not happen to hold public office.

The Board's conclusion that the reelection of a public official to a second term of office does not constitute reemployment so as to provide a second opportunity for reinstating previously withdrawn service credit was a reasonable interpretation that furthers, rather than conflicts with, the intent of the Legislature as expressed by W. Va. Code § 5-10-18(a). The language and implication of the statute are clear: reelection to consecutive term of office does not constitute reemployment or a return to employment for this purpose.

V. CONCLUSION

As set forth above, the language of W. Va. Code § 5-10-18(a) is clear in providing one opportunity for reinstating previously forfeited service credit. Thus, under this statute, the reelection of an incumbent to a consecutive term of office does not constitute reemployment so as to provide an additional opportunity for reinstatement of previously forfeited credit. The Board's interpretation is reasonable and not contrary to legislative intent, and therefore should have been afforded great weight and substantial deference by the Circuit Court. For these reasons, the Circuit Court's Order answering the certified question in the affirmative should be reversed.

VI. RELIEF PRAYED FOR

For the reasons set forth herein, Appellant respectfully prays that this Honorable Court answer the question certified by the Circuit Court of Berkeley County in the negative.

Respectfully Submitted,

THE WEST VIRGINIA CONSOLIDATED
PUBLIC RETIREMENT BOARD
Appellant



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APPEAL FROM THE CIRCUIT COURT OF BERKELEY COUNTY

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Christopher C. Wilkes, Judge

CERTIFICATE OF SERVICE

I, Lenna R. Chambers, counsel for Appellant, West Virginia Consolidated Public Retirement Board, hereby certify that I have served the foregoing *"Brief on Behalf of Appellant, West Virginia Consolidated Public Retirement Board"* upon the Respondent's counsel by mailing a true copy thereof in an envelope in the United States Mail, postage prepaid, this 6th day of August 2007, addressed as follows:

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